Supreme Court, U.S.
FILED
NOV 13 2006
OFFICE OF THE CLERK

No. 06-685

In the
Supreme Court of the United States

ARTHUR W. FUESTING,
Petitioner,

v.

ZIMMER, INC.,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID STEVENS
Counsel of Record
BRENT D. HOLMES
JASON M. CROWDER
Attorneys
HELLER, HOLMES & ASSOC., P.C.
1101 BROADWAY, P.O. BOX 889
MATTOON, IL 61938-0889
(217) 235-2700

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a party's failure to file a Federal Rule of Civil Procedure 50(b) motion for judgment as a matter of law or a Rule 59 motion for a new trial following a jury verdict prevents that party from seeking a new trial on appeal where the appeal concerns alleged errors in the admission of evidence as it would if the appeal concerned the sufficiency of the evidence.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and in the United States Court of Appeals for the Seventh Circuit.

The Petitioner here and Appellee below is Arthur W. Fuesting.

The Respondent here and Appellant below is Zimmer, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Arthur W. Fuesting is a private person and not a corporation.

There is no parent corporation or publically held company owning 10% or more of the stock of Respondent Zimmer, Inc.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Corporate Disclosure Statement iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Rules Involved 1

Statement of the Case 4

Reasons for Granting the Petition 5

1. Introduction 5

2. This Court in *Unitherm* Reaffirmed Its Holdings in *Cone* and Its Progeny 6

3. The Circuit Courts of Appeals Are Sharply Divided On This Issue 9

4. The Seventh Circuit Misread and Misapplied *Unitherm* 12

5. The Seventh Circuit Erred Based on Its Misunderstanding of *Unitherm*, *Cone*, and *Globe* 14

6. *Cone*, *Globe*, and *Unitherm* Are Harmonious With FRE 103 and Entirely Reconcilable 16

7. This Court's Practical Reasoning in *Cone* and *Unitherm* 18

Conclusion 20

Appendix

TABLE OF AUTHORITIES

Page

Cases

Cerabio LLC v. Wright Medical Technology, Inc.,
410 F.3d 981 (7th Cir. 2005) 13

Collins v. Wayne Corp.,
621 F.2d 777 (5th Cir. 1980) 17

Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212, 67 S. Ct. 752,
91 L. Ed. 849 (1947) . . . . . *passim*

Elcock v. Kmart Corp.,
233 F.3d 734 (3d Cir. 2000) 14

Fuesting v. Zimmer, Inc.,
421 F.3d 528 (7th Cir. 2005) 1, 4, 11

Fuesting v. Zimmer, Inc.,
448 F.3d 936 (7th Cir. 2006) . . . . . *passim*

Globe Liquor Co. v. San Roman,
332 U.S. 571, 68 S. Ct. 246,
92 L. Ed. 177 (1948) . . . . . *passim*

Greer v. Carpenter,
323 Mo. 878 (1929) 18

Hi Limited Partnership v. Winghouse of Florida, Inc.,
451 F.3d 1300 (11th Cir. 2006) 12

Jankins v. TDC Management Corp., Inc.,
21 F.3d 436 (D.C. Cir. 1994) 13

Jerden v. Amstutz,
430 F.3d 1231 (9th Cir. 2005) 14

Johnson v. New York, N.H. & H.R. Co.,
344 U.S. 48, 73 S. Ct. 125,
97 L. Ed. 77 (1952) 6, 7, 8

Mathis v. Exxon Corp.,
302 F.3d 448 (5th Cir. 2002) 17

Metcalf v. Bochco,
2006 WL 2472193 (9th Cir. 2006) 10

Mihailovich v. Laatsch, 359 F.3d 892 (7th Cir.),
cert. denied, 543 U.S. 926, 125 S. Ct. 345,
160 L. Ed. 2d 225 (2004) 13

Mukhtar v. California State University Hayward,
299 F.3d 1053 (9th Cir. 2002) 13

Peat, Inc. v. Vanguard Research, Inc.,
378 F.3d 1154 (11th Cir. 2004) 14

Phoenix Associates III v. Stone,
60 F.3d 95 (2d Cir. 1995) 13

Probus v. K-Mart,
794 F.2d 1207 (7th Cir.1986) 15

*Public Service Co. of Indiana, Inc. v. Bath Iron
Works Corp.*, 773 F.2d 783 (7th Cir. 1985) 14

Sherrill v. Royal Industries, Inc.,
526 F.2d 507 (8th Cir. 1975) 15

United States v. Johnson,
327 U.S. 106, 66 S. Ct. 464, 90 L. Ed. 562 (1946) . . . 18

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,
___ U.S. ___, 126 S. Ct. 980,
63 L. Ed. 2d 974 (2006) . . . . . *passim*

Vazquez-Valentin v. Santiago-Diaz,
459 F.3d 144 (1st Cir. 2006) 9

Weisgram v. Marley Co.,
528 U.S. 440, 120 S. Ct. 1011,
145 L. Ed. 2d 958 (2000) 14, 15, 18

Wilson v. Williams,
182 F.3d 562 (7th Cir. 1999) 17

Statutes and Rules

28 U.S.C. Section 2072 1

Federal Rule of Civil Procedure 50 . . . . . *passim*

Federal Rule of Civil Procedure 59 . . . . i, 1, 2, 3, 16, 20

Federal Rule of Evidence 103 . . . . . 9, 14, 16, 17

Federal Rule of Evidence 803(18) 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005), and is reproduced in the Appendix to this Petition at A-2 through A-17. The Seventh Circuit's Opinion on rehearing is reported at *Fuesting v. Zimmer*, 448 F.3d 936 (7th Cir. 2006), and is reproduced in the Appendix to this Petition at A-18 through A-29. There was no opinion at the District Court level; the appeal to the Seventh Circuit was from a jury verdict. The District Court's Judgment in a Civil Case is reproduced in the Appendix to this Petition at A-32 through A-33.

JURISDICTION

The Court of Appeals entered its initial judgment in this matter on August 30, 2005, and its judgment on rehearing on May 22, 2006. It denied Petitioner's petition for rehearing en banc on August 23, 2006. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

RULES INVOLVED

The question presented in this case concerns Federal Rules of Civil Procedure 50 and 59, promulgated pursuant to 28 U.S.C. Section 2072.

Rule 50 provides that:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue,

the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law, or;

(2) if no verdict was returned

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

Rule 59 provides in pertinent part that:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or any part of the issues

(1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and

(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings of fact and conclusions, and direct the entry of a new judgment.

(b) Time for Motion.

Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

Petitioner Arthur W. Fuesting filed his Complaint sounding in negligence and strict product liability against Respondent Zimmer, Inc., in Coles County, Illinois, on October 10, 2002, and the matter was removed to the United States District Court for the Central District of Illinois on November 27, 2002. (Doc. 1) The District Court had diversity jurisdiction pursuant to 28 U.S.C. Section 1332. (Doc. 1) Following a jury verdict, the District Court entered judgment for Petitioner and against Respondent in the amount of $650,000.00 on April 5, 2004. (Doc. 63) Respondent requested on April 12 and 13, 2004 (Docs. 64-65), and was granted on April 13, 2004 (Doc. 65), an extension of time to May 24, 2004, in which to file post-trial motions, but did not file such motions. Respondent then filed a Notice of Appeal on April 30, 2004. (Doc. 68)

The United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court on August 30, 2005, and remanded the cause with instructions to the District Court to enter judgment as a matter of law for Respondent and against Petitioner. (See *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005).) Petitioner filed a timely Petition for Rehearing in the Seventh Circuit, and the Court of Appeals stayed consideration of the Petition because this Court had granted a writ of certiorari in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 543 U.S. 1186, 125 S. Ct. 1396, 161 L. Ed. 2d 189 (2005). On January 26, 2006, this Court rendered its decision in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, ___ U.S. ___, 126 S. Ct. 980, 160 L. Ed. 2d 974 (2006). Subsequently, on May 22, 2006, the Seventh Circuit granted the petition for rehearing and issued a new decision vacating its previous order to the District Court to enter judgment as a matter of law for Respondent but

instead ordering a new trial. (See *Fuesting v. Zimmer, Inc.*, 448 F.3d 936 (7th Cir. 2006).) Petitioner filed a timely new Petition for Rehearing and Petition for Rehearing En Banc on June 22, 2006, following an Order allowing an extension of time on June 1, 2006. The Seventh Circuit denied the Petition for Rehearing and Petition for Rehearing En Banc on August 23, 2006.

This Petition for a Writ of Certiorari follows. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

REASONS FOR GRANTING THE PETITION

1. Introduction.

This Court should grant the petition for a writ of certiorari and reverse the judgment of the Seventh Circuit in order to resolve an important, recurring question of trial procedure and appellate review upon which the United States circuit courts of appeals are sharply divided. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, ___ U.S. ___, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006), this Court stated in no uncertain terms that: "[A] party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court." (*Id.* at 987.) Its holding was not limited to new trials based upon a review of the sufficiency of the evidence. The Seventh Circuit misunderstood or ignored the plain language of the decision and ordered a new trial in this matter despite the fact that Respondent had failed to file a post-trial motion for a new trial. (*Fuesting*, 448 F.3d at 942.) It did, however, vacate its previous order to the District Court to enter judgment as a matter of law in favor of Respondent when Respondent failed to seek that relief in a post-trial motion, finding that it "erred in awarding judgment to [Respondent]." (*Id.* at 939.)

This pure question of federal law is presented squarely in this case, and the matter is ripe for adjudication by this Court.

2. This Court in *Unitherm* Reaffirmed Its Holdings in *Cone* and its Progeny.

In *Unitherm*, the defendant had moved for Judgment as a Matter of Law (JMOL) at the Rule 50(a) stage, but failed to renew its motion for JMOL pursuant to Rule 50(b). (126 S. Ct. at 984.) The Federal Circuit held that the defendant's failure to file a postverdict motion for JMOL did not preclude the defendant from seeking a new trial on appeal. (*Id.*) This Court reversed, holding that "a party may only pursue on appeal *a particular avenue of relief* available under Rule 50(b), namely the entry of judgment or a new trial, when that party has complied with the Rule's filing requirements by requesting *that particular relief* below." (*Id.* at 986 (emphasis altered).) The Court further held that under its prior precedents, including *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947); *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177 (1948); and *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77 (1952), the district courts and circuit courts are "powerless" to provide relief that was not requested in a preverdict Rule 50(a) motion and renewed in a postverdict Rule 50(b) motion. (*Id.* at 985-86, 988.)

In *Cone*, Respondent moved for a directed verdict at the close of evidence, but failed to renew its motion after a jury verdict for Petitioner. (*Cone*, 330 U.S. at 213, 67 S. Ct. at 754, 91 L. Ed. 849.) The court of appeals found evidence presented to the jury should have been excluded. (*Id.*) Without the inadmissible evidence, the court found there was

insufficient evidence to support a verdict for the Petitioner and directed judgment for the Respondent. (*Id.* at 214, 67 S. Ct. at 754, 91 L. Ed. 849.) The Supreme Court reversed, finding the court of appeals "without power to direct the District Court" in the absence of a Federal Rule of Civil Procedure 50(b) motion. (*Id.* at 218, 67 S. Ct. at 756, 91 L. Ed. 849.) Like the present case, the *Cone* court addressed an error in the admission of evidence rather than an argument that there was insufficient evidence to support the verdict. (*Id.* at 214, 67 S. Ct. at 754, 91 L. Ed. 849.) The Seventh Circuit's erroneous decision in this matter results primarily from its ignoring the fact that the *Cone* case addressed an error in the admission of evidence.

A year after *Cone*, this Court in *Globe Liquor Co.* reiterated its holding in *Cone*, finding that the rule applied whether the jury had rendered a verdict or the district court judge had directed a verdict. (332 U.S. at 573, 68 S. Ct. at 247, 92 L. Ed. 177.) In *Globe* the issue again involved the question of whether the district court had committed a legal error; this time its alleged refusal to allow deposition testimony to be admitted at trial. The respondents in *Globe* had in fact moved for a new trial, but they had not requested judgment as a matter of law. The judgment of the Court of Appeals granting judgment as a matter of law was reversed, and the cause was remanded for a new trial consistent with the post-trial motion. (*Id.* at 574, 68 S. Ct. at 247-48, 92 L. Ed. 177.)

In 1952 this Court decided in *Johnson* that a circuit court of appeals is deprived of the power to order the entry of judgment as a matter of law where the district court expressly reserved a party's preverdict directed verdict motion and then denied it after the verdict. (344 U.S. at 49, 72 S. Ct. at 126, 97 L. Ed. 77.) In *Johnson* the respondent had moved to have

the verdict set aside, but it failed to ask for judgment as a matter of law. (*Id.* at 54, 72 S. Ct. at 128, 97 L. Ed. 77.) It did request a new trial, and this request was granted. (*Id.*) This Court stated: "Rule 50(b) as written and construed by us is not difficult to understand or to observe." (*Id.* at 53, 72 S. Ct. at 128, 97 L. Ed. 77.) It reversed the circuit court's order granting judgment as a matter of law. (*Id.* at 54, 72 S. Ct. at 128, 97 L. Ed. 77.) Presumably if the Respondent had failed to request a new trial, as in this case, it would not have been awarded one.

The holdings in *Cone*, *Globe*, and *Johnson* were reaffirmed by this Court in *Unitherm*. According to this Court in *Unitherm,* the authority of a Circuit Court of Appeals to grant a new trial where there was no Rule 50(b) motion is limited to situations where the party "moved for a new trial post-verdict in the District Court." (126 S. Ct. at 987.) In *Unitherm* this Court did not expressly limit its holding to cases involving challenges to the sufficiency of the evidence, but instead cited extensively to *Cone,* which involved the admissibility of evidence. (*Id.* at 986-88.) This Court renewed its position on Rule 50(b) motions from *Cone,* but added an admonition that a "party is not entitled to pursue a *new trial* on appeal unless that party makes an appropriate post-verdict motion in the district court." (*Id.* at 987 (emphasis added).) Respondent herein argued, and the Seventh Circuit held, that *Unitherm* and the requirements of post-verdict motions in Rule 50 only apply to challenges based on the sufficiency of the evidence. That holding, however, is directly contrary to the facts and holding of *Cone* and the extension of *Cone* by this Court in *Unitherm*. "Whether an appellate court may enter judgment in the absence of a post-verdict motion, as opposed to whether an appellate court may order a new trial," is a distinction which is "immaterial." (*Id.* at 986.)

> "[I]f, as in *Cone* . . ., a litigant that has failed to file a Rule 50(b) motion is foreclosed from seeking the relief it sought in its Rule 50(a) motion--*i.e.*, the entry of judgment--then surely respondent is foreclosed from seeking a new trial, relief it did not . . . seek in its preverdict motion. In short, respondent never sought a new trial before the District Court, and thus forfeited its right to so do on appeal." (*Id.* at 988.)

The Seventh Circuit's decision to distinguish this case from *Unitherm* because the present case involves an alleged error in the admission of evidence cannot be reconciled in light of this Court's reliance in *Unitherm* on *Cone*–a case which also involved an alleged error in the admission of evidence.

3. The Circuit Courts of Appeals Are Sharply Divided On This Issue.

The Seventh Circuit is not the only circuit to have erred in interpreting *Unitherm* in this way. In *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144(1st Cir. 2006), the First Circuit came to essentially the same conclusion. It reversed the judgment of the District Court and remanded the cause for a new trial where the appealing party had not filed a post-trial motion requesting that relief pursuant to its reading of *Unitherm* and Federal Rule of Evidence 103. It stated: "*Unitherm* does not mean that a party has to file a post verdict motion in order to preserve an evidentiary objection for appeal." (459 F.3d at 148, n.2.) Its previous entry of judgment in favor of the defendant in that case had been vacated by this Court when it granted the petition for certiorari and remanded the cause for further consideration in light of its decision in *Unitherm*. (*Id.* at 146.) The First

Circuit neither cited nor referred to the Seventh Circuit's decision in the instant case, which had preceded it by two months.

Similarly, the Ninth Circuit in *Metcalf v. Bochco*, 2006 WL 2472193, *1, n.1 (9th Cir. 2006), on August 28, 2006, in an unpublished opinion stated in a footnote:

> "Defendants cite *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, ___ U.S. ___, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006), in support of their contention that the Metcalfs cannot pursue the remedy of a new trial on appeal because they did not make an appropriate post-verdict motion in the District Court. *Unitherm*, however, deals with the specific situation of a party's failure to renew, post-verdict, a Rule 50 motion challenging the sufficiency of the evidence in a civil jury trial. *Id.* The Supreme Court held that without satisfying this crucial step, the party cannot on appeal seek the remedy of a new trial on the basis that the evidence below was insufficient to support the jury verdict. *Id.* at 989. No Rule 50 motion was ever made by the Metcalfs, nor do they challenge the sufficiency of the evidence on appeal. Therefore, *Unitherm* is inapposite and the Metcalfs have not waived their ability to challenge the District Court's rulings."

The Ninth Circuit reviewed the evidentiary claims of the Metcalfs even though they had not filed a post-trial motion for a new trial, but ultimately affirmed the judgment of the District Court.

In reality, these courts necessarily engage in a "sufficiency of the evidence" review when considering alleged error in the introduction of evidence, notwithstanding *Unitherm's* prohibition in the absence of a postverdict motion. To reach its conclusion that it could order a new trial, the Seventh Circuit in *Fuesting* first struck from the trial record statements from acknowledged learned treatises, even one co-authored by Zimmer's retained expert, Dr. Burstein. These statements are substantive evidence under Federal Rule of Evidence 803(18). No objection to this evidence was made at the District Court level. Even worse, the Seventh Circuit acknowledged that the expert testimony of plaintiff's treating orthopedic surgeon (who was extremely knowledgeable about the scientific research and the reason for the failure of the artificial knee) also supported the verdict. While conceding no objection was made to this testimony, the appeals court engaged in its own weighing of the sufficiency of this evidence and declared that Dr. McKechnie's testimony on this issue was "sparse." (*Fuesting*, 421 F.3d at 537.)

In fact, his testimony was extensive. But this demonstrates that the court engaged in a "sufficiency of the evidence" review plainly prohibited by *Unitherm*. In reviewing the other evidence to determine whether the alleged erroneous introduction of Dr. Pugh's testimony was "harmless" in light of the other evidence supporting the verdict, or "prejudicial" on the other hand, the Seventh Circuit overstepped its bounds and thus ignored or chose not to follow this Court's clear, unequivocal, and unambiguous ruling in *Unitherm* which reaffirmed its prior uniform line of precedent in *Cone* and *Globe*. Finally, as noted in *Unitherm*, there would be serious Seventh Amendment implications if a reviewing court could simply nullify a jury verdict in the absence of any postverdict motion requesting such relief. (*Unitherm*, 126 S. Ct. at 986, n.4.)

The Eleventh Circuit, on the other hand, has interpreted this Court's decision in *Unitherm* to mean what it says. In *Hi Limited Partnership v. Winghouse of Florida, Inc.*, 451 F.3d 1300 (11th Cir. 2006), decided on June 15, 2006, the Eleventh Circuit determined it was precluded from considering an argument for a new trial where the appealing party had not filed a postverdict motion. (451 F.3d at 1301-02.) It affirmed the judgment of the District Court, stating: "Accordingly, this court has no authority to consider its appeal from the jury verdict below." (*Id.* at 1302.) Although the Eleventh Circuit decision was available prior to its decision in the instant case, the Seventh Circuit did not cite or refer to it, quite likely because the Eleventh Circuit does not support its position.

There is thus a genuine conflict between the circuit courts on an important matter arising from this Court's recent decision in *Unitherm*. Continuation of this conflict will give rise to differing standards in different parts of the country on an important, recurring issue of trial procedure and appellate review. Had this case arisen in the Eleventh Circuit, the result would have been different. This Court should grant the petition for writ of certiorari in order to resolve this conflict and make clear an important and recurring area of the law.

4. The Seventh Circuit Misread and Misapplied *Unitherm*.

The Seventh Circuit based its decision on a reading of *Unitherm* that turns the case's holding on its head. While acknowledging that this Court stated that "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court" (126 S. Ct. at 987), it then parsed that language to state that "*Unitherm* does not foreclose the ability of the appellate court to order a new trial where evidence was improperly

admitted." It asserts that this Court in *Unitherm* "was specifically addressing the situation of a litigant seeking a new trial on the basis of the insufficiency of the evidence." (448 F.3d at 939.) While that statement is true as far as it goes (see 126 S. Ct. at 987-88), the Seventh Circuit's conclusion that this "Court did not hold that a court of appeals may not award a new trial on the basis of an erroneous evidentiary decision" (448 F.3d at 939) does not follow. A court of appeals may certainly award a new trial on the basis of an erroneous evidentiary decision, but according to the rule established in *Cone* and *Globe* and reaffirmed in *Unitherm* it may only do so when the appealing party files an appropriate post-trial motion for a new trial.

In order to support its position, the Seventh Circuit cites six cases wherein, prior to this Court's decision in *Unitherm* the Seventh Circuit (*Cerabio LLC v. Wright Medical Technology, Inc.*, 410 F.3d 981 (7th Cir. 2005); *Mihailovich v. Laatsch*, 359 F.3d 892 (7th Cir.), cert. denied, 543 U.S. 926, 125 S. Ct. 345, 160 L. Ed. 2d 225 (2004); and *Public Service Co. of Indiana, Inc. v. Bath Iron Works Corp.*, 773 F.2d 783 (7th Cir. 1985)); the Ninth Circuit (*Mukhtar v. California State University Hayward*, 299 F.3d 1053 (9th Cir. 2002)); the Second Circuit (*Phoenix Associates III v. Stone*, 60 F.3d 95 (2d Cir. 1995)); and the D. C. Circuit (*Jankins v. TDC Management Corp., Inc.*, 21 F.3d 436 (D.C. Cir. 1994)) "have awarded new trials purely on the basis of evidentiary errors." (*Id.* at 940.) The opinions in these cases fail to note whether or not the appellants filed the appropriate post-trial motion for a new trial, but in *Mukhtar*, at least, a post-trial motion for judgment as a matter of law was apparently made, because such a motion was granted as to one defendant. (See 299 F.3d at 1061, n.3.)

5. The Seventh Circuit Erred Based on Its Misunderstanding of *Unitherm*, *Cone*, and *Globe*.

In this case the Seventh Circuit relies upon Federal Rule of Evidence 103(a), which provides: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." It admits, as it must, that Rule 103 "is primarily focused on renewal at trial" (*Fuesting*, 448 F.3d at 940), but goes on to extrapolate that "it follows that renewal through postverdict motions is unnecessary if the rule dictates that a claim of error for appeal is preserved by the original objection or motion *in limine*." (*Id.*) Such was not the case after *Cone* and *Globe*, and most assuredly is not the case after *Unitherm*.

The Seventh Circuit does cite three cases (*Jerden v. Amstutz*, 430 F.3d 1231 (9th Cir. 2005); *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154 (11th Cir. 2004); and *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000)) wherein the appealing party followed the "better practice" of filing proper postverdict motions in cases where it eventually appealed on the basis of evidentiary errors, but it notes that these decisions do not indicate that such filings are necessary. (448 F.3d at 941.) *Cone* was not raised in these cases. If there was any doubt after *Cone* and *Globe* that a postverdict motion was necessary to vest the circuit courts of appeals with the power to grant the relief of a new trial, that doubt was removed by this Court's decision in *Unitherm*.

The Seventh Circuit also refers to this Court's decision in *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000), first for the proposition that it affirms the ability of the court of appeals to award judgment as a matter of law where the evidence was insufficient after

improperly admitted evidence was excised from the record (448 F.3d at 940), but also in a footnote admitting that the defendant in *Weisgram* in fact filed appropriate post-trial motions. (*Id.* at 941 n.2.) The Seventh Circuit apparently believes it significant, however, that "[n]othing in *Weisgram* suggests that the court of appeals could not have awarded a new trial had the appellant simply appealed the evidentiary decision." (*Id.*) That issue was not before this Court in *Weisgram*, however, and it is not surprising that the Court declined to discuss it in the opinion.

Additionally, the Seventh Circuit argues that "the *Unitherm* decision does not purport to undermine those cases which explicitly state that a post-judgment motion is not a prerequisite to an appeal." (*Id.*) It then cites two such cases, one from the Seventh Circuit in 1986 (*Probus v. K-Mart*, 794 F.2d 1207, 1209 n.2 (7th Cir. 1986)) and another from the Eighth Circuit in 1975 (*Sherrill v. Royal Industries, Inc.*, 526 F.2d 507, 509 n.2 (8th Cir. 1975)). It is not at all clear why the Seventh Circuit fails to understand that this Court's holding in 2006 moots these earlier pronouncements of two circuit courts of appeals. They simply no longer accurately state the law. Undermining those cases is precisely what this Court did in *Unitherm*.

Finally, the Seventh Circuit attempts to justify its position with reference to "the conclusions of leading commentators." (*Id.* at 941.) It is, of course, impossible for these commentators to have considered this Court's 2006 decision in *Unitherm* in their cited 2005 and 1995 commentaries; their opinions prior to this decision carry no weight whatsoever.

The Seventh Circuit summed up its reading of *Unitherm* in this way:

> "[W]ithout an explicit declaration from the Supreme Court, we will not strain to read one of its decisions as overturning a right of appellate review that is stated in the Federal Rules of Evidence, manifested in the precedents of numerous court of appeal decisions, and observed in the leading treatises." (448 F.3d at 941.)

Such a reading ignores the plain language of the decision; this Court has made as "explicit" a declaration as the Seventh Circuit could wish for. Effective with this Court's decision in *Unitherm*, a new rule is in place (or more precisely, the rule established in *Cone* is reiterated and reinforced): "[A] party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court." (126 S. Ct. at 987-88.) This general rule applies to reviews of the sufficiency of the evidence and to reviews of errors in the admission or rejection of evidence alike, Federal Rule of Evidence 103 notwithstanding. The Seventh Circuit may not like it, but it is obligated to follow it, as are all the Circuit Courts in the country.

6. *Cone*, *Globe*, and *Unitherm* Are Harmonious With FRE 103 and Entirely Reconcilable.

Cone, *Globe*, and *Unitherm* (and Federal Rules of Civil Procedure 50 and 59) are harmonious with Rule 103 of the Federal Rules of Evidence and entirely reconcilable. Federal Rule of Evidence 103(a) states: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." (Fed. R. Evid. 103(a).) The entire last sentence of Federal Rule of Evidence 103(a) was added pursuant to a

2000 amendment. Notes to the 2000 amendment concern motions *in limine* and pre-trial rulings on evidence which re-surface during trial, not post-trial procedural requirements after a jury verdict. (Fed. R. Evid. 103(a) Advisory Committee Notes, 2000 Amendment.) The amendment was intended to resolve a dispute concerning pre-trial rulings allowing or excluding evidence and whether another objection was necessary during trial to preserve the issue for appeal. (*Id.*) Prior to this amendment, some courts required parties to object a second time during the presentation of the evidence at trial in order to preserve the issue for appeal despite having made the same objection in the motion *in limine*. (See e.g., *Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980).) The Seventh Circuit recognized the differing approaches and need for a uniform rule in *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999). The amendment provided a uniform rule stating a pre-trial ruling on evidentiary issues, specifically a motion *in limine*, was all that was required. (See *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002).) The amendment was necessary to preserve the policy behind motions *in limine*: (1) to prevent the slowing of trial where a definitive ruling has already been made; and (2) to avoid alerting a jury through an objection or offer of proof of that which should have been concealed. (*Wilson*, 182 F.3d at 566.) The advisory committee answered with a uniform rule speaking to trial conduct. It did not intend for the amendment to be applied in contravention of the procedural requirements of the Federal Rules of Civil Procedure, which require the losing party after a jury verdict first to request the district court for a new trial or judgment as a matter of law as a prerequisite for seeking such relief in a subsequent appeal.

7. This Court's Practical Reasoning in *Cone* and *Unitherm*.

In *Cone* and *Unitherm,* this Court discussed a practical reason for requiring a party to seek relief first from the district court. A district court should be given a chance to exercise its discretion in ruling on a 50(b) motion because the trial judge has "fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by the witnesses" and should be "afforded a 'last chance to correct his own errors without delay, expense, or other hardships of an appeal.'" (*Cone*, 330 U.S. at 216, 67 S. Ct. at 755, 91 L. Ed. 849 (citing *Greer v. Carpenter,* 323 Mo. 878, 882 (1929), and *United States v. Johnson,* 327 U.S. 106, 112, 66 S. Ct. 464, 466, 90 L. Ed. 562 (1946)).) In *Globe,* this Court reiterated that alleged legal errors are first addressed to the district court.

> "Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether its error should result in a new trial or in a judgment finally ending the controversy. For there is here a dispute between the parties whether all or certain parts of a deposition containing important evidence were properly introduced in the trial court." (*Globe,* 332 U.S. at 573, 68 S. Ct. at 247, 92 L. Ed. 177.)

More recently, this Court in *Weisgram* had this to say about the district court's rightful role in initially passing on these matters postverdict:

> "Many rulings on evidence, of course, do not bear dispositively on the adequacy of

> the proof to support a verdict. For example, the evidence erroneously admitted or excluded may strengthen or weaken one side's case without being conclusive as to the litigation's outcome. Or, the evidence may abundantly support a jury's verdict, but one or another item may have been unduly prejudicial to the verdict loser and excludable on that account.
>
> * * *
>
> "Such run-of-the-mine, ordinarily nondispositive, evidentiary rulings, we take it, were the sort contemplated in *Montgomery Ward*. Cf. 311 U.S., at 245-246, 61 S.Ct. 189 (indicating that sufficiency-of-the-evidence challenges are properly raised by motion for judgment, while other rulings on evidence may be assigned as grounds for a new trial)." (528 U.S. at 452, n.9, 20 S. Ct. at 1019, n.9, 145 L. Ed. 2d 958 .)

In its ruling on the postverdict motion, the district court can explain whether the alleged error was minor or substantial, whether waiver applies because of no objection, and whether the error was harmless in light of the entire trial record. Most importantly, by affording the district court the first opportunity to correct claimed errors of law postverdict, an appeal may be avoided entirely if the trial court grants the requested relief. If not, a written opinion by the trial judge should narrow the issues for appeal.

In *Unitherm*, this Court re-emphasized its reasoning in *Cone,* saying that a post-verdict motion under Rule 50(b) affords the "benefits of the district court's input" which is necessary whether the "party is seeking judgment as a matter of law or simply a new trial." (126 S. Ct. at 982.)

Respondent in this matter is bound by the requirements of the Federal Rules of Civil Procedure, but neglected either to move for a new trial or judgment as a matter of law. It has forfeited its right to a new trial, and the Seventh Circuit's decision is inconsistent with Federal Rules of Civil Procedure and this Court's holdings in *Cone* and *Unitherm*. This Court should grant certiorari and remand the cause to the Seventh Circuit with instructions to dismiss Respondent's appeal or summarily affirm the verdict, consistent with the uniform line of its cases (*Unitherm* being the fourth). The Court of Appeals is without power to grant either a new trial or a judgment as a matter of law where the losing party after verdict failed to file the required post-trial motion. There are no exceptions.

CONCLUSION

The split in the United States circuit courts of appeals on this fundamental issue of trial procedure and appellate review presents a critical need for guidance by this Court. Petitioner submits this Court should review and reverse the decision below and articulate clear guidelines on the application of Rules 50(b) and 59 for appellate review of questions of the admission of evidence in addition to reviews of the sufficiency of the evidence. The question in this Petition presents an important and recurring issue of federal law.

The reluctance of the circuit courts of appeals to adhere to *Cone*, *Globe*, and *Unitherm* can be readily rectified by vacating the Seventh Circuit's opinions in this case and remanding the cause with instructions to the Seventh Circuit to summarily affirm the jury verdict, or alternatively to dismiss Respondent's appeal.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

David Stevens
Counsel of Record
Brent D. Holmes
Jason M. Crowder
Attorneys for Petitioner

November, 2006.

APPENDIX

TABLE OF CONTENTS OF APPENDIX

Page

A. *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005) A-2

B. *Fuesting v. Zimmer, Inc.*, 448 F.3d 936 (7th Cir. 2006) A-18

C. Order Denying Petition for Rehearing and Petition for Rehearing En Banc, 8/23/06 . . . . . A-30

D. Judgment in a Civil Case, 4/5/04 . . . . . A-32

Appendix A

421 F.3d 528

United States Court of Appeals,
Seventh Circuit.

Arthur W. FUESTING, Plaintiff-Appellee,
v.
ZIMMER, INC., Defendant-Appellant.

No. 04-2158.

Argued Jan. 4, 2005.
Decided Aug. 30, 2005.

Background: Patient brought action for strict products liability and negligence against orthopaedic implant manufacturer, seeking to recover damages resulting from failure of his prosthetic knee. The United States District Court for the Central District of Illinois, Harold A. Baker, J., entered judgment on jury verdict awarding patient $650,000. Manufacturer appealed.

Holdings: The Court of Appeals, Williams, Circuit Judge, held that:

(1) patient's violation of local circuit rule warranted striking of portion of response brief on appeal;

(2) expert for patient had requisite knowledge, skill, experience, training, and education;

(3) district court conducted inadequate examination of testimony proffered by patient's expert;

(4) expert's testimony on causation issue was unreliable, necessitating its exclusion; and

(5) expert's testimony on implant defect was unreliable, necessitating its exclusion.

Reversed and remanded with instruction.

Jason M. Crowder (argued), Heller, Holmes & Associates, Mattoon, IL, for Plaintiff-Appellee.

Steven L. Jackson (argued), Baker & Daniels, Fort Wayne, IN, for Defendant-Appellant.

Before FLAUM, Chief Judge, and EVANS and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

In this strict liability and negligence case, plaintiff Arthur W. Fuesting sued defendant Zimmer, Inc., an orthopaedic implant manufacturer, for damages resulting from the failure of his prosthetic knee. After a jury trial, where Fuesting was awarded $650,000, Zimmer appeals, arguing that the district court erroneously applied Federal Rule of Civil Procedure 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) in admitting unreliable expert testimony. Because we find that the district court did err in admitting unreliable expert testimony, we reverse. We further find that Fuesting cannot prevail on his claims as a matter of law without this improperly admitted testimony. Finally, we remand the case to the district court with instructions to direct a verdict in defendant's favor.

I. BACKGROUND

Zimmer is a manufacturer of orthopaedic implants and

in 1991 manufactured an implant known as the I/B Knee, which was designed to increase the mobility of knee joints and to restrict involuntary knee motion. It is used in a medical procedure called total knee anthroplasty, which is a procedure that involves the replacement of three bone surfaces with artificial components: the lower end of the femur (thigh bone); the top surface of the tibia (shin bone); and the back surface of the patella (knee cap). The I/B Knee has a metal femoral component, a dome-shaped patellar component, and a metal tibial bone plate with an ultra-high molecular weight polyethylene surface molded on top. In 1991, Zimmer sterilized all of its I/B Knee implants through a process known as gamma irradiation in an air environment-a sterilization method almost universally employed by knee prosthesis manufacturers at that time.

Fuesting, who suffers from arthritis in both knees, had his right knee replaced with one of Zimmer's I/B Knee implants on February 5, 1992.FN1 The procedure was performed by Fuesting's treating orthopaedic surgeon, Dr. James McKechnie. The tibial component of this particular implant had been manufactured and sterilized seven months before the procedure-a period of "time on the shelf" considered short by industry standards. By May of 2001, Fuesting began experiencing pain and swelling in the right knee. Accordingly, on November 14, 2001, Dr. McKechnie replaced the Zimmer knee implant with a Johnson & Johnson model.FN2 Due to grinding and crunching in the new model, the knee was replaced yet again on April 23, 2003.

FN1. In 1985, Fuesting had his left knee replaced with one of Zimmer's I/B Knee implants. To date, this implant continues to function well.

FN2. The orthopaedic community refers to the replacement of

a knee implant as a "revision."

In October 2002, Fuesting brought two claims against Zimmer related to its I/B Knee based on theories of strict liability and negligence related to design defect. The defect in the design of the I/B Knee, according to Fuesting, was the method in which it was sterilized at the time of its manufacture (gamma irradiation in air). In support of his claim, the plaintiff proffered two witnesses: his treating orthopaedic surgeon (Dr. McKechnie) and an expert witness by the name of James Pugh.

Pugh, a litigation consultant, was vital to both Fuesting's theories of liability, opining as to both causation and defect. With respect to causation, Pugh opined that Zimmer's chosen method of sterilization, as well as the implant's time on the shelf, caused the implant's polyethylene to oxidate, and ultimately delaminate and prematurely fail. As to defect (and negligence for that matter), it was Pugh's opinion that alternative sterilization methods (such as ethylene oxide and gamma irradiation in an inert environment) were available to Zimmer in 1991; that these methods were better than gamma irradiation in air; and that Zimmer should have known of them at the time of the I/B Knee's manufacture.

In a pre-trial motion in limine, Zimmer moved to exclude Pugh's opinions on causation and defect as unreliable under Federal Rule of Evidence 702. The district court denied the motion, allowing Pugh to testify at trial. At trial, Pugh-attributing his opinions to "basic polymer science"-testified that the cause of Fuesting's right I/B Knee's premature failure was its sterilization through gamma irradiation in air, and concluded that any knee implant (with a polyethylene tibial component) sterilized in such a manner

would be defective. Dr. McKechnie concurred, based solely on his "major in chemistry."

To debunk the plaintiff's theory on causation, Zimmer offered its own expert testimony at trial. Dr. William Maloney-an orthopaedic surgeon and leading researcher in the field of joint replacement and osteolysis-testified that the delamination in Fuesting's implant was likely attributable not to oxidation of its polyethylene component, but rather to physical abrasions and wear and tear of the implant's components due to peculiarities in Fuesting's gait and bone growth. Maloney further testified that the plaintiff's post-implant weight gain-in contravention of his doctor's advice-exacerbated this wear and tear. In addition, Dr. Albert Burstein, the implant co-inventor, testified that the gamma sterilization process probably did not cause oxidation, that wear and tear caused the failure, and that the implant was a tremendous clinical success. Burstein further testified that Pugh's proffered, alternative sterilization process was more dangerous and more likely to cause wear.

In response to Fuesting's theory on design defect, Zimmer sought to introduce evidence on the state of the art of implant sterilization in 1991 through Dr. Albert Burstein. In contrast to Pugh's opinion on defect, Dr. Burstein would testify as the I/B Knee's co-inventor that in 1991 it was virtually universal industry practice to sterilize implants by gamma irradiation in air. Fuesting objected to this testimony, arguing that the data and other information that Burstein considered in forming his opinion on state of the art had not been disclosed to the plaintiff as required of Rule 702 witnesses by Federal Rules of Civil Procedure 26(a)(2)(A) & (B). The district court agreed, and, despite having allowed Fuesting to introduce evidence that Zimmer and other manufacturers today sterilize implants in inert (as opposed to

open air) environments, barred Dr. Burstein's state of the art testimony.

The jury found in favor of Fuesting, awarding him $650,000. On appeal, Zimmer challenges, among other things, the denial of its motion to exclude Pugh's testimony on causation and defect.

II. ANALYSIS

In both strict liability and negligence actions regarding design, Illinois law (under which Fuesting's claims proceed) requires plaintiffs to establish "the existence of a defective condition in the product at the time it left the manufacturer's control," Carrizales v. Rheem Mfg. Co., 226 Ill.App.3d 20, 168 Ill.Dec. 169, 589 N.E.2d 569, 580 (1991), and "a causal link between the alleged design defect ··· and [the plaintiffs] injury," Baltus v. Weaver Division of Kidde & Co., 199 Ill.App.3d 821, 145 Ill.Dec. 810, 557 N.E.2d 580, 586 (1990). Toward both these ends, Fuesting proffered the expert testimony of Pugh-the propriety of which rests at the center of this appeal. Before reaching the merits of Zimmer's appeal, however, we must first address its motion to strike a portion of Fuesting's appellate response brief.

A. Zimmer's Motion to Strike Portions of Fuesting's Brief on Appeal Granted

In the first five pages of his Response brief-a portion of his statement of facts entitled "Published Literature"-Fuesting cites several medical journal articles that suggest that implant sterilization by gamma irradiation in air causes ultra high molecular weight polyethylene components to oxidize. He marshals these articles here in an apparent effort to bolster his expert's testimony on causation and

defect. Indeed, these works may suggest that Pugh's challenged conclusions have received some modicum of acceptance from the scientific community. The problem is, these articles cannot be found in the record.

Accordingly, Zimmer argues that this portion of Fuesting's statement of facts must be stricken as violative of Seventh Circuit Rule 28(c). Rule 28(c) requires that an appellate brief's statement of facts "be a fair summary without argument or comment. No fact shall be stated as part of the brief unless it is supported by reference to the page or pages of the record or appendix where that fact appears." The articles cited in the first five pages of Fuesting's Response were neither before the district court during its Daubert briefing on the admissibility of Pugh's testimony, nor referenced by Pugh in his expert report, nor authenticated, moved, or admitted into evidence. And while the quotes from these articles can be found on the trial transcript, they appear there only by virtue of Fuesting's counsel having read sentences from each article to Zimmer's expert witness (Dr. Burstein) during cross-examination. What's more, once read to him, the quotes almost invariably met with Dr. Burstein's disapproval. Cf. Fed.R.Evid. 803(18) (excepting "statements contained in published treatises, periodicals, or pamphlets on a subject of ··· medicine, or other science" from the rule excluding hearsay provided that such treatises have been "called to the attention of an expert witness upon cross-examination" and " established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice") (emphasis added).

This is not the first time that the propriety of this portion of Fuesting's brief has been challenged. In a previous motion to strike pursuant to Rule 28(c), which we granted on October 4, 2004, Zimmer noted these very same deficiencies,

as well as one more-a failure to provide cites to the record or an appendix where the contested articles could be found. Fuesting has since revised his brief to include requisite cites to the record, arguing now that such amendments have cured any previously found deficiencies.

But Rule 28(c) requires more of litigants than mere support citations and record references. It also requires that appellate brief fact statements be a fair summary of the facts. See Day v. N. Ind. Pub. Serv. Corp., 164 F.3d 382, 384-85 (7th Cir.1999) (granting motion to strike pursuant to Rule 28(c) where portion of fact statement was argumentative and unsupported by citation). The reasons for requiring a fair summary are patent and aplenty, and chief among them is the efficient administration of the appellate process. See id. ("Rule 28(c) is vital to efficient performance of the appellate task."). Citations to the record designed to convince the court of a fact devoid of basis in the record impede that administration. They are in effect designed to mislead the court, and for that reason are, to put it mildly, not fair. Thus, misleading factual assertions and citations violate Rule 28(c) too. See McDonald v. Village of Winnetka, 371 F.3d 992, 1009 n. 11 (7th Cir.2004) (noting that misleading cites to the record violate Rule 28(c)). Set forth without context or qualification, Fuesting's quotations from articles neither before the court nor in evidence as "facts" are misleading, and thus violate Rule 28(c). Therefore, Zimmer's renewed motion to strike is granted, and this court will not consider the first five pages of Fuesting's amended response.

B. Inadequate Daubert Inquiry

Proceeding to the merits of the appeal, Zimmer challenges the district court's denial of its pre-trial motion to exclude Pugh's expert testimony on causation and defect. The

admissibility of scientific expert testimony is governed by Federal Rule of Evidence 702, and in particular Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "We first undertake a de novo review of whether the district court properly followed the framework set forth in Daubert." Bradley v. Brown, 42 F.3d 434, 436 (7th Cir.1994). "Provided the district court adhered to Daubert 's parameters, we will not disturb the district court's findings unless they are manifestly erroneous." Id. at 436-37.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education[ ] may testify thereto[,] in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert has construed Rule 702 as requiring the district court to perform a "gate-keeping function" before admitting expert scientific testimony. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). This function is to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. Before even considering whether the testimony "will assist the trier of fact to understand or determine a fact in issue," a district court must make "a

preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." Id. at 592-93, 113 S.Ct. 2786.

To aid courts in assessing the reliability of scientific expert testimony, the Daubert Court set forth the following, non-exhaustive list of "guideposts" for consideration: (1) whether the scientific theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the theory's known or potential rate of error when applied; and (4) whether the theory has been "generally accepted" in the scientific community. Id. at 593-94, 113 S.Ct. 2786; see also Chapman v. Maytag Corp., 297 F.3d 682, 687 (7th Cir.2002). In addition to these factors, the 2000 Advisory Committee's Notes to Rule 702 suggest other benchmarks for gauging expert reliability, including: (5) whether "maintenance standards and controls" exist; (6) whether the testimony relates to "matters growing naturally and directly out of research they have conducted independent of the litigation," or developed "expressly for purposes of testifying"; (7) "[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion"; (8) "[w]hether the expert has adequately accounted for obvious alternative explanations"; (9) "[w]hether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting"; and (10) "[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give." Fed.R.Evid. 702 advisory committee's note (2000 amends.).

While the particular factors identified in Daubert may not always be pertinent in assessing the reliability of expert testimony, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), they are

precisely apt for analysis here, see Daubert, supra (concerning the admissibility of expert testimony regarding the deleterious medical effects of introducing a foreign substance-the antinausea drug, Bendectin-into the human body). And while we again must emphasize that the Daubert inquiry is a flexible one, and that an expert's testimony need not satisfy each of the above factors to be admissible, it is nonetheless crucial that a Daubert analysis of some form in fact be performed. Chapman, 297 F.3d at 687.

Although the district court offered a relatively lengthy discussion of Pugh's credentials, the court's Daubert factor analysis was not sufficient. As the court noted in assessing whether the expert had the requisite "knowledge, skill, experience, training, or education," Pugh obtained an undergraduate degree from the Massachusetts Institute of Technology (MIT) in Metullurgy and Materials, and a doctorate from MIT in Biomedical Engineering; he has extensive experience in the fields of biomedical engineering, metullurgy, and materials science, including professorships at colleges of engineering and medicine; and he has long studied polyethylene failure (the chemical that allegedly delaminated, causing Fuesting's implant to fail). Accordingly, the court rightly concluded that "Dr. Pugh possesses the requisite knowledge, skill, experience, training, and education pursuant to Fed.R.Evid. 702."

But possessing requisite credentials alone is not enough to render expert testimony admissible. Clark v. Takata Corp., 192 F.3d 750, 759 n. 5 (7th Cir.1999) ("A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are reliable and relevant under the test set forth by the Supreme Court in Daubert."). The district court must also, in keeping with its gatekeeper's duty, assess the reliability of the methodology the expert has

employed in arriving at his opinion. This the district court did not do. Instead, the court made reference to Pugh's deposition, satisfying itself that "his analysis was discussed at length throughout the deposition [where] he articulated a scientific reason for the failure of the polyethylene in Fuesting's knee" without "rely[ing] on generalized analogies or inapplicable scientific principles." But nothing is said as to what exactly that articulated scientific reason is, or how it measures up to Daubert's indicia of reliability. The court, invoking again Pugh's deposition as well as his expert report, further found that the expert had sufficiently ruled out Fuesting's weight and activity level as potential causes of polyethylene failure in the plaintiff's implant. But the court made no mention of how Pugh ruled those alternative causes out, let alone whether and why it found that method reliable. To satisfy its essential role, the gatekeeper must do more than just make conclusory statements. A more searching Daubert analysis is required, and we find the district court's examination of Pugh's testimony inadequate.

Indeed, when subjected to a more thorough Daubert analysis, Pugh's testimony proves unreliable, as its juxtaposition against the Daubert guideposts plainly reveal. Turning first to his testimony on causation, Pugh opined that Zimmer's chosen method of sterilization (gamma irradiation in air), as well as the implant's time on the shelf (seven months), caused the implant's polyethylene to oxidate, then delaminate, and ultimately fail. "The first and most significant Daubert factor is whether the scientific theory has been subjected to the scientific method." Bradley, 42 F.3d at 438. Here, it is undisputed that Pugh did not conduct any scientific tests or experiments to bolster his theory relating polyethylene delamination to gamma irradiation in air, nor did he produce or rely upon any studies to verify his conclusions. See Chapman, 297 F.3d at 688 (finding error in the admission of

expert testimony unsupported by scientific tests, experiments, and studies). Such insulation of his theory from the dispassionate crucible deeply, if not fatally, compromises his testimony's reliability.

Another indicator of unreliability is the unjustifiable extrapolation from an accepted premise to an unfounded conclusion. See Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 657-58 (7th Cir.1998) (holding that a "bare conclusion" offered without explanation or empirical support fails the reliability requirement of Rule 702); Fed.R.Evid. 702 advisory committee's note (2000 amends.) (listing "[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion" as a relevant factor in determining reliability of expert testimony). Rather than relying upon tests, experiments or studies, Pugh attributed his opinion to "basic polymer science," which, even Zimmer concedes, reveals that gamma irradiation of polyethylene can create free radicals that bond with oxygen, thereby decreasing its molecular weight by keeping molecular chains from re-forming, increasing its density, and making the polyethylene susceptible to delamination. The problem here is that Pugh did not bridge the analytical gap between these basic principles and his complex conclusions. For example, he did not specify, with respect to Fuesting's implant in particular, what quantum of each variable is required to set this agreed upon chain reaction in motion. How much radiation does it take to cause oxidation, and to what degree? How much oxidation must occur to render polyethylene more susceptible to delamination? And once polyethylene becomes more susceptible to delamination, how then does oxidation affect

delamination? Are all forms of polyethylene, including that used by Zimmer (which the company claims to be oxidation-resistant), susceptible to delamination? What effect, if any, does implantation into the human body have on the rate of oxidation? Basic polymer science alone cannot answer these questions. Some greater methodology is required to bridge the analytical gap between general principles and particular conclusions, and to vest thereby the opinion with requisite reliability.

Furthermore, Pugh's delamination theory has not been published or otherwise subjected to peer review, and there is no evidence that his theory has gained general acceptance in the scientific community. See Cummins v. Lyle Indus., 93 F.3d 362, 369 (7th Cir.1996) ("Rule 702 is designed to ensure that, when expert witnesses testify in court, they adhere to the same standards of intellectual rigor that are demanded in their professional work. This objective can be accomplished in a number of different ways, including through the review of experimental, statistical, or other scientific data generated by others in the field."). In particular, his untested and unpublished theory that polyethylene delamination from oxidation triggered by gamma irradiation results in an appearance distinctive from delamination from other causes-leaving a readily identifiable "signature" or "hallmark"-has not received any, let alone general, scientific acceptance. To the contrary, the record suggests that the I/B Knee at issue is one of the most successful knee implants ever studied, has the longest and highest survivorship rate published for any knee prothesis, and has even been called the "gold standard" of its kind.

Finally, while there is some genuine disagreement as to whether Pugh has adequately accounted for alternative causes of the implant's failure, Fuesting does not dispute that

Pugh developed his opinion expressly for this litigation. All told, Pugh's testimony on causation stacks up quite poorly against most all indicia of reliability, rendering the district court's decision to admit the opinion error.

Nor does Pugh's testimony on defect pass Rule 702 muster. As to defect, Pugh testified that alternative sterilization methods (such as ethylene oxide and gamma irradiation in an inert environment) were available to Zimmer in 1991; that these methods were better than gamma irradiation in air; and that Zimmer should have known of them at the time of the I/B Knee's manufacture. But here again Pugh failed to perform a reliable comparison of the chosen sterilization technique with the proffered alternatives. Instead, he relied solely on the fact that the gamma irradiation in air causes more oxidation than other methods, while neglecting to consider other factors that may have counseled the use of that chosen method (such as effectiveness in sterilization, or minimizing implant wear and tear).

Furthermore, Pugh's testimony that Zimmer should have sterilized the subject implant through gamma irradiation in an inert environment is wholly unfounded. The record reveals that, at the time of the subject I/B Knee implant's manufacture (1991), it was virtually universal industry practice to sterilize such implants by gamma irradiation in air. Indeed, no manufacturer at that time employed any of Pugh's proffered methods, and Pugh has cited no contemporary articles counseling the use of such methods. Accordingly, the district court's decision to admit Pugh's opinion on defect was also error.

Without Pugh's testimony, Fuesting cannot establish either defect or negligence, as he proffered absolutely no other evidence in support of those elements. And, save for

Dr. McKechnie's sparse testimony on the subject-based merely on his "major in chemistry," presenting another untested extrapolation susceptible to Rule 702 challenge-Fuesting has offered no other evidence as to causation. In the absence of such evidence, Fuesting cannot establish the requisite elements of his claim, and thus cannot prevail on his claims as a matter of law. Therefore, we see no reason to remand for a new trial, nor to reach the other issues raised on this appeal. Instead, we reverse this case and remand the matter to the district court with instructions to direct a verdict in favor of defendant.

III. CONCLUSION

For the reasons stated above, we Reverse the district court's decision to admit Pugh's expert testimony on causation and defect, and Remand this case to the district court with instructions to direct a verdict in defendant's favor.

Appendix B

448 F.3d 936

United States Court of Appeals,
Seventh Circuit.

Arthur W. FUESTING, Plaintiff-Appellee,
v.
ZIMMER, INC., Defendant-Appellant.

No. 04-2158.

Argued May 3, 2006.
Decided May 22, 2006.

Background: Patient brought action for strict products liability and negligence against orthopaedic implant manufacturer, seeking to recover damages resulting from failure of his prosthetic knee. The United States District Court for the Central District of Illinois, Harold A. Baker, J., entered judgment on jury verdict awarding patient $650,000. Manufacturer appealed. The Court of Appeals, 421 F.3d 528, reversed and remanded with instructions.

Holding: On rehearing, the Court of Appeals, Williams, Circuit Judge, held that in prior decision it should not have awarded judgment in favor of manufacturer, but instead should have ordered new trial.

Vacated in part.

Brent D. Holmes (argued), Jason M. Crowder, Heller, Holmes & Associates, Mattoon, IL, for Plaintiff-Appellee.

Steven L. Jackson (argued), Baker & Daniels, Fort Wayne, IN, for Defendant-Appellant.

Before FLAUM, Chief Judge, and EVANS and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

This opinion resolves plaintiff-appellee Fuesting's petition for rehearing and addresses the question of what relief the court of appeals has the power to award where there was prejudicial evidentiary error in the district court. Our August 30, 2005 decision in this case found prejudicial error in the district court's decision to admit Fuesting's expert testimony and remanded with instructions to enter judgment in favor of Zimmer. See Fuesting v. Zimmer, 421 F.3d 528 (7th Cir.2005). Subsequently, Fuesting filed a petition for rehearing. We stayed consideration of the petition because the Supreme Court had granted a writ of certiorari on the question of whether a court of appeals can review the sufficiency of the evidence supporting a civil jury verdict where the appellant failed to renew its Rule 50(a) motion after the verdict. See Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 543 U.S. 1186, 125 S.Ct. 1396, 161 L.Ed.2d 189 (2005). We ordered the parties to file responsive memoranda, if they so chose, within 14 days of the Supreme Court's decision. On January 23, 2006, the Supreme Court rendered its decision. Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., --- U.S. ----, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006). The parties have submitted responses, and Fuesting argues that the Unitherm decision precludes this court from awarding any relief to Zimmer because Zimmer failed to file, after the verdict, either a Rule 50(b) motion for judgment as a matter of law or a Rule 59 motion for a new trial. Zimmer argues that Unitherm only addresses appeals based on the sufficiency

of the evidence, and does not disturb this court's decision, which was based on the improper admission of testimony. We conclude that Unitherm does not prevent us from granting Zimmer relief from the district court's error. The proper remedy, however, should have been the grant of a new trial. For reasons discussed in more detail below, we grant the petition for rehearing and vacate only the portion of our prior opinion directing the district court to enter judgment for the defendant.

I. BACKGROUND

Fuesting filed this suit against Zimmer Inc., the manufacturer of his failed prosthetic knee, alleging negligence and strict liability. Our prior decision explains the factual background and discusses in detail our reasons for concluding that, pursuant to Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the district court erred in admitting the testimony of Dr. James Pugh, Fuesting's expert witness. See Fuesting, 421 F.3d at 537. In this opinion, we assume familiarity with our prior decision and will discuss only the relevant procedural history.

Prior to trial, Zimmer moved in limine to exclude the testimony of Dr. Pugh, pursuant to Federal Rule of Evidence 702. The district court denied Zimmer's motion in limine and the trial proceeded. Dr. Pugh testified at trial, as did Fuesting's orthopaedic surgeon, Dr. James McKechnie. Both Dr. Pugh and Dr. McKechnie offered opinions on Zimmer's causation of Fuesting's injuries; specifically, they testified that Zimmer's air sterilization method led to Fuesting's injuries. Fuesting did not offer any other medical or expert witnesses and only introduced the deposition testimony of Zimmer's chief scientific officer. At the close of evidence,

Zimmer moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The district court denied the motion and submitted the case to the jury. On April 2, 2004, the jury returned a verdict in favor of Fuesting. Though the court granted Zimmer's motion to extend the time to file postverdict motions, Zimmer never renewed its Rule 50(a) motion for judgment as a matter of law and did not file any postverdict motions. Zimmer subsequently filed its appeal, arguing that it was entitled to a new trial because (1) the district court erred in admitting Dr. Pugh's testimony, and (2) the jury instructions were erroneous.

We concluded that, pursuant to Daubert and Rule 702, Dr. Pugh's testimony was scientifically unreliable and the district court committed prejudicial error in admitting the testimony. See Fuesting, 421 F.3d at 536-37.. Because we deemed the remaining evidence insufficient for Fuesting to establish his claims as a matter of law, we reversed and remanded to the district court with instructions to enter judgment for Zimmer.

II. ANALYSIS

The question before us is what relief, if any, may be awarded to Zimmer in light of the Supreme Court's decision in Unitherm. In that case, the plaintiff, Unitherm, sued ConAgra seeking a declaration that a ConAgra patent was invalid. Unitherm, 126 S.Ct. at 983. Prior to the submission of the case to the jury, ConAgra moved for judgment as a matter of law pursuant to Rule 50(a), arguing that the evidence was insufficient for a reasonable jury to find in Unitherm's favor. Id. at 984. The district court denied the motion. Id. After the jury returned a verdict for Unitherm, ConAgra appealed without filing any postverdict motions. Id. On appeal, the Federal Circuit found that the evidence

Unitherm presented was legally insufficient to support the verdict, and therefore it vacated the jury's judgment and ordered a new trial. Id. The Supreme Court concluded that, in the absence of postverdict Rule 50 or 59 motions, the court of appeals was without the power to assess the sufficiency of the evidence and could not award a new trial or order the entry of judgment for ConAgra. See id. at 989 ("we hold that since respondent failed to renew its preverdict motion as specified in Rule 50(b), there was no basis for review of respondent's sufficiency of the evidence challenge in the Court of Appeals").

Unitherm compels us to vacate our instructions to the district court to enter judgment for Zimmer because the Supreme Court has now indicated that a court of appeals may not award judgment due to insufficiency of the evidence where no Rule 50(b) motion was filed after the verdict. The Court stated:

> This Court has addressed the implications of a party's failure to file a postverdict motion under Rule 50(b) on several occasions and in a variety of procedural contexts. This Court has concluded that, "[i]n the absence of such a motion" an "appellate court [is] without the power to direct the District Court to enter judgment contrary to the one it had permitted to stand." Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

Unitherm, 126 S.Ct. at 985 (bracketed text in original; parallel citations omitted). Though our prior decision was not explicitly framed as a determination that the evidence was insufficient, on review we conclude that weighing the value of

Fuesting's remaining evidence after excising Dr. Pugh's expert testimony crossed the line into activity proscribed by Unitherm.

Our conclusion exposes a subtle tension between the ability of the appellate court to engage in harmless error analysis and the court's responsibility not to weigh the sufficiency of the evidence in the absence of a properly filed postverdict motion; determining whether an evidentiary error is harmless necessarily requires some weighing of the sufficiency of the evidence. Our prior decision in this case is a paradigmatic example of this tension, since we were required to assess the sufficiency of the remaining evidence (the testimony of Fuesting's orthopaedic surgeon and the deposition excerpts) in the absence of the testimony we deemed inappropriately admitted in order to determine whether the district court's error prejudiced Zimmer. See Fuesting, 421 F.3d at 537 ("Without Pugh's testimony, Fuesting cannot establish either defect or negligence···· And, save for Dr. McKechnie's sparse testimony on the subject ··· Fuesting has offered no other evidence as to causation").

Unitherm suggests that it will usually be inappropriate for a court of appeals to award judgment in the absence of a properly filed Rule 50(b) motion because awarding judgment involves a complete examination of the sufficiency of the evidence that must take place first in the district court. FN1 See Unitherm, 126 S.Ct. at 986. We thus erred in awarding judgment to Zimmer.

FN1. Unitherm does not address the question of whether an appellate court may grant judgment for the defendant where no evidence remains after the court of appeals reverses an evidentiary decision in the trial court. We need not, and do not, answer that question today.

However, Unitherm does not foreclose the ability of the appellate court to order a new trial where evidence was improperly admitted. To the extent that the Court held that awarding a new trial would be improper in Unitherm, the Court was specifically addressing the situation of a litigant seeking a new trial on the basis of the insufficiency of the evidence. See Unitherm, 126 S.Ct. at 987-88 ("[respondent] seeks a new trial based on the legal insufficiency of the evidence") (emphasis in original). The Court did not hold that a court of appeals may not award a new trial on the basis of an erroneous evidentiary decision.

There is some potential for confusion because Unitherm includes some strong language regarding the necessity of postverdict motions, language that Fuesting reads to limit a party's ability to challenge any legal error where it failed to file a postverdict motion. See Unitherm, 126 S.Ct. at 987-88 ("the precise subject matter of a party's Rule 50(a) motion-namely, its entitlement to judgment as a matter of law-cannot be appealed unless that motion is renewed pursuant to Rule 50(b)"). After discussing the line of cases undergirding its holding, the Court wrote: "Accordingly, these outcomes merely underscore our holding today-a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court." Id. The potential for confusion in the context of evidentiary challenges exists because, as discussed above, the prejudice analysis in appellate review of evidentiary decisions involves what might be considered an implicit weighing of the sufficiency of the evidence. An appellate court cannot truly determine whether an error was harmless without considering the force of the other evidence presented to the jury. Cf. Williams v. Pharmacia, Inc., 137 F.3d 944, 951 (7th Cir.1998) (finding error to be harmless because "there was sufficient evidence independent of the hearsay testimony upon

which the jury could rely in finding Pharmacia liable for sex discrimination under each of Williams's Title VII claims"). Perhaps adding to the potential for Fuesting's confusion, there are numerous cases in which the appellant filed a pre-trial motion in limine as well as a postverdict motion for a new trial based on the denied evidentiary motion. See, e.g., Weisgram v. Marley Co., 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000) (affirming the ability of the appellate court to award judgment as a matter of law where evidence was insufficient after improperly admitted evidence was excised from the record).

Nevertheless, the ability of the court of appeals to award a new trial where there is prejudicial evidentiary error is well-established and undisturbed by Unitherm. The Federal Rules of Evidence make clear that a party is not required to renew an objection to an evidentiary motion in order to preserve its right to appeal. See Fed.R.Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal"). The advisory committee notes explain that the 2000 amendment to Rule 103 resolves a dispute in the courts as to whether "a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal." Though, as the committee notes reveal, Rule 103 is primarily focused on renewal at trial, it follows that renewal through postverdict motions is unnecessary if the rule dictates that a claim of error for appeal is preserved by the original objection or motion in limine. We cannot reconcile Rule 103's explicit pronouncement that a motion in limine "preserve[s] a claim of error on appeal" with Fuesting's view of the Unitherm case, which would preclude the court from awarding any relief to a party that was prejudiced by an evidentiary error

but did not file a postverdict motion. A preserved claim of error on appeal is meaningless if the court of appeals, handcuffed by Rule 50, has no authority to award relief. Had the Supreme Court intended to create such a broad rule, we presume the Court would have done so explicitly, addressing Rule 103 as well as the substantial body of cases in which courts of appeals have awarded new trials purely on the basis of evidentiary errors. See, e.g., Cerabio LLC v. Wright Medical Technology, Inc., 410 F.3d 981 (7th Cir.2005); Mihailovich v. Laatsch, 359 F.3d 892 (7th Cir.), cert. denied, 543 U.S. 926, 125 S.Ct. 345, 160 L.Ed.2d 225 (2004); Mukhtar v. California State University Hayward, 299 F.3d 1053 (9th Cir.2002); Phoenix Associates III v. Stone, 60 F.3d 95 (2d Cir.1995); Jankins v. TDC Management Corp. Inc., 21 F.3d 436 (D.C.Cir.1994); Public Service Co. of Indiana Inc. v. Bath Iron Works Corp., 773 F.2d 783 (7th Cir.1985). Furthermore, the Unitherm decision does not purport to undermine those cases which explicitly state that a post-judgment motion is not a prerequisite to an appeal. See Probus v. K-Mart, 794 F.2d 1207, 1209 n. 2 (7th Cir.1986) ("Although the plaintiff made no post-judgment motion for a new trial on the basis of these errors, it is well settled that such a motion is not a prerequisite to appeal"); Sherrill v. Royal Industries, Inc., 526 F.2d 507, 509 n. 2 (8th Cir.1975) (stating, in case involving jury instruction error, "[a] motion for a new trial under Fed.R.Civ.P. 59 is not a prerequisite to an appeal").

Fuesting's reading of Unitherm is also at odds with the conclusions of leading commentators. See, e.g., 12 J. Moore et al., Moore's Federal Practice § 59.55 (3d ed. 2005) ("A motion for a new trial is not required to preserve properly made objections for appellate review, and is therefore not a prerequisite to an appeal from the judgment"). On the point in question, Wright and Miller similarly observe that "[t]he

settled rule in federal courts, contrary to that in many states, is that a party may assert on appeal any question that has been properly raised in the trial court. Parties are not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal." 11 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2818 (2d ed.1995). They further write:

> A renewed motion for judgment as a matter of law under Rule 50(b) is not a condition precedent to appeal from a final judgment. If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial, although it is better practice for the parties to give the trial court an opportunity to correct its errors in the first instance.

Id. at 9A § 2540. Like the Unitherm Court, Wright and Miller specifically identify a sufficiency of the evidence challenge as uniquely requiring a postverdict motion in order to preserve appellate review. Many litigants, of course, have followed the "better practice" of filing postverdict motions in cases where they subsequently appealed on the basis of evidentiary errors. FN2 See, e.g., Jerden v. Amstutz, 430 F.3d 1231 (9th Cir.2005) (ordering a new trial on basis of evidentiary error where appellant had moved post-verdict for a new trial); Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154 (11th Cir.2004) (same); Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir.2000) (ordering a partial new trial on the basis of error in admitting expert testimony relating to

damages, where appellant moved postverdict for a new trial); Hester v. BIC Corp., 225 F.3d 178 (2d Cir.2000) (new trial ordered on basis of evidentiary error where appellant moved postverdict for a new trial).FN3 However, these decisions do not indicate that such filings were necessary.

FN2. Professor Martin Redish, writing in Moore's, observes: "although not a prerequisite to an appeal, it is often advisable to bring the alleged errors to the trial court's attention by moving for a new trial, to avoid the time and expense of an appeal before a new trial ordered by the appellate court." 12 J. Moore et al., Moore's Federal Practice § 59.55 (3d ed.2005).

FN3. In Weisgram, the defendant filed Rule 50(b) and 59 motions claiming the evidence was insufficient because of the evidentiary error. See Weisgram, 528 U.S. at 445, 120 S.Ct. 1011. Nothing in Weisgram suggests that the court of appeals could not have awarded a new trial had the appellant simply appealed the evidentiary decision.

In sum, without an explicit declaration from the Supreme Court, we will not strain to read one of its decisions as overturning a right of appellate review that is stated in the Federal Rules of Evidence, manifested in the precedents of numerous court of appeals decisions, and observed in the leading treatises. Our prior decision, finding prejudicial error in the admission of Dr. Pugh's testimony, went too far in awarding judgment for Zimmer. There was other evidence in the record supporting Fuesting's claims even after Dr. Pugh's testimony was excluded, and Unitherm makes clear that we were not permitted to assess the sufficiency of the remaining evidence in the absence of a postverdict motion. However, we do not disturb our conclusion that the admission of Dr. Pugh's testimony prejudiced Zimmer, and Zimmer is entitled to

relief. The appropriate remedy was to remand for a new trial, and such relief is granted by this opinion.

III. CONCLUSION

The petition for panel rehearing is Granted. Our instructions to enter judgment for Zimmer are Vacated and the case is Remanded to the district court for proceedings consistent with this opinion.

Appendix C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 23, 2006

Before

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. TERRENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 04-2158

ARTHUR W. FUESTING, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Central District of Illinois.
v.	No. 02 CV 02251
ZIMMER, INC., *Defendant-Appellant.*	Harold A. Baker, *Judge*

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by plaintiff-appellee Arthur Fuesting on June 22, 2006, no judge in regular active service has requested a vote on the petition for rehearing en

banc, and all of the members of the original panel have voted to DENY the petition for rehearing. Accordingly, the petition for rehearing is DENIED.

Appendix D

United States District Court
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

ARTHUR FUESTING,
Plaintiff,

vs. Case Number: **02-2251**

ZIMMER, INC.
Defendant.

X JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is entered in favor of the plaintiff Arthur Fuesting and against the defendant Zimmer, Inc. in the sum of $650,000.00. The parties shall bear their own costs.

ENTER this 5th day of April, 2004.

s/John M. Waters
JOHN M WATERS, CLERK

s/K. Wynn
BY: DEPUTY CLERK

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

No. 06-685

IN THE

Supreme Court of the United States

ARTHUR W. FUESTING,
Petitioner,

v.

ZIMMER, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

JON LARAMORE
Counsel of Record
STEVEN L. JACKSON
J. STEPHEN BENNETT
KATHY L. OSBORN
BAKER & DANIELS LLP
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204-1782
(317) 237-0300

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

When the court of appeals awarded the remedy of new trial for an evidentiary error that was preserved for appeal by the district court's definitive ruling on a motion *in limine*, did it misapply *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006)?

CORPORATE DISCLOSURE STATEMENT

Zimmer, Inc., is a wholly owned subsidiary of Zimmer Holdings, Inc., a publicly held corporation. No other publicly held corporation owns 10% or more of Zimmer, Inc., stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
RULES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS TO DENY THE WRIT	5
I. The Seventh Circuit correctly applied *Unitherm.*	5
II. There is no circuit conflict	7
III. The Seventh Circuit properly applied error preservation principles	11
IV. There are alternative grounds to grant a new trial	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Alexander v. Riga, 208 F.3d 419 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001)..... 9
Barnes v. Rivas, No. 05-41436, 2006 WL 3334583 (5th Cir. Nov. 17, 2006) (unreported).. 9
Burrus v. Young, 808 F.2d 578 (7th Cir. 1986)..... 7
Calton v. City of Garland, No. 05-10364, 170 Fed.Appx. 338 (5th Cir. March 8, 2006), *cert. denied*, 127 S. Ct. 133 (2006) (unreported)..... 10
Chemetall GMHB v. ZR Energy, Inc., 320 F.3d 714 (7th Cir. 2003) 6
Clark v. Newport News Shipbuilding & Dry Dock Co., 937 F.2d 934 (4th Cir. 1991) 6
Daubert v. Merrill Dow Pharms., Inc., 509 U.S. 579 (1993)..... 3, 4, 6
Elmore v. U.S., 843 F.2d 1128 (8th Cir. 1988)..... 6, 11
Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322 (11th Cir. 1999) 9
First United Pentecostal Church v. Guideone Specialty Mut. Ins. Co., No. 05-12398, 189 Fed. Appx. 852 (11th Cir. June 28, 2006) (unreported) 10
Frazier v. Thomas, No. 05-15489, 176 Fed. Appx. 996 (11th Cir. April 21, 2006) (unreported) 10
Fuesting v. Zimmer, Inc., 421 F.3d 528 (7th Cir. 2005)..... 3, 4, 6
Fuesting v. Zimmer, Inc., 448 F.3d 936 (7th Cir. 2006)..... *passim*
Hamilton v. Leavy, No. 05-2059, 2006 WL 3203920 (3d Cir. Nov. 7, 2006) (unreported).... 9
Hi Limited P'ship v. Winghouse of Fla., Inc., 451 F.3d 1300 (11th Cir. 2006) 8, 9, 10, 11

TABLE OF AUTHORITIES—Continued

Page

McDonald v. Alpen House Ltd., Corp., No. 05-15904, 183 Fed.Appx. 867 (11th Cir. June 7, 2006) (unreported) 10

Metcalf v. Bochco, No. 04-56097, 2006 WL 2472193 (9th Cir. Aug. 28, 2006) (unreported) ..7, 8, 11

Santos v. Posadas De Puerto Rico Assocs., Inc., 452 F.3d 59 (1st Cir. 2006) 9

U.S. v. Gajo, 290 F.3d 922 (7th Cir. 2002), *cert. denied*, 537 U.S. 938 (2002) 11

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980 (2006) ..... *passim*

Vázquez-Valentín v. Santiago-Díaz, 459 F.3d 144 (1st Cir. 2006), *petition for cert. filed*, 75 USLW 3295 (U.S. Nov. 17, 2006) (No. 06-702) 7, 8, 10, 11

OTHER AUTHORITIES

1 McCormick on Evid. § 51 (6th ed. 2006) 7

19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 205.5[3] (3d ed. 2006) 7

9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 50.91[1] (3d ed. 2006) 7

9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROCEDURE SUPP. SERVICE, § 2537 (Jan. 2007) 7

RULES

Amendments to FED. R. EVID., 192 F.R.D. 398 (2000) (Advisory Comm. Report) 5

Federal Rule of Civil Procedure 50 ..... *passim*

Federal Rule of Civil Procedure 51 ..... 1, 2, 3, 6, 9

Federal Rule of Civil Procedure 59 1

Federal Rule of Evidence 103 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Third Circuit Rule 28.3	10
Fifth Circuit Rule 47.5.4	9
Ninth Circuit Rule 36-3	7
Eleventh Circuit Rule 36-2	10

IN THE

Supreme Court of the United States

No. 06-685

ARTHUR W. FUESTING,

Petitioner,

v.

ZIMMER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

RULES INVOLVED

Zimmer agrees with Fuesting's statement that this case concerns Federal Rules of Civil Procedure 50 and 59. In addition, this case concerns Federal Rule of Evidence 103(a) and Federal Rule of Civil Procedure 51.

Federal Rule of Evidence 103(a) provides that:

> (a) Effect of Erroneous Ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike ap-

pears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Federal Rule of Civil Procedure 51 provides in pertinent part as follows:

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c); or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and—unless the court made a definitive ruling on the record rejecting the request—also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

STATEMENT OF THE CASE

Arthur W. Fuesting needed knee replacement surgery, and he received an artificial knee manufactured by Zimmer, Inc. Fuesting had problems with the knee, and he sued Zimmer for negligence and product liability in a case tried to a jury in the United States District Court in Urbana, Illinois, under the district court's diversity jurisdiction.

The district court jury awarded Fuesting a $650,000 verdict. Zimmer made no motion under Federal Rule of Civil Procedure 50(b) ("Rule 50(b)") after the verdict. On appeal, Zimmer raised four issues: whether Fuesting's expert witness on product defect met the standard in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); whether the district court improperly barred state-of-the-art evidence; whether the district court erred in instructing the jury on a theory not raised by the evidence; and whether the district court erred in its instruction on contributory negligence.

The United States Court of Appeals for the Seventh Circuit reversed and ordered judgment entered in Zimmer's favor on the *Daubert* error, reaching none of the other three issues. *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005), Pet.

App. A-2. The Seventh Circuit concluded that Fuesting's expert failed to satisfy *Daubert*, and Fuesting therefore had failed to introduce any evidence to prove defect. This failure to provide any evidence on one element of the claim justified the Seventh Circuit's order that the district court enter judgment for Zimmer. *Id.* at A-9, -17.

While Fuesting's petition for rehearing was pending, this Court decided *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006), and the Seventh Circuit ordered rebriefing in light of *Unitherm*.

On rehearing, the Seventh Circuit ruled that Zimmer properly preserved its *Daubert* objection and remained entitled to relief on that error. *Fuesting v. Zimmer, Inc.*, 448 F.3d 936 (7th Cir. 2006), Pet. App. A-18. It further ruled, however, that new trial was the only relief available in light of *Unitherm*. *Id.* at A-24.

The Seventh Circuit also concluded on rehearing that its decision to remand for entry of judgment in Zimmer's favor involved weighing evidence—determining that without Fuesting's expert there was insufficient evidence of defect. It further concluded that *Unitherm* precluded the remedy of remand for entry of judgment because it barred the appellate court from addressing sufficiency of evidence in the absence of a Rule 50(b) motion. *Id.* at A-26, -29. Thus only new trial, not remand for entry of judgment, was the proper remedy.

As the Seventh Circuit wrote:

> *Unitherm* does not foreclose the ability of the appellate court to order a new trial where evidence was improperly admitted. To the extent that the Court held that awarding a new trial would be improper in *Unitherm*, the Court was specifically addressing the situation of a litigant seeking a new trial on the basis of the insufficiency of the evidence. *See Unitherm*, 126 S. Ct. at 987-

> 88 ("[respondent] seeks a *new trial* based on the legal insufficiency of the evidence") (emphasis in original). The Court did not hold that a court of appeals may not award a new trial on the basis of an erroneous evidentiary decision.

Pet. App. A-24.

REASONS TO DENY THE WRIT

I. The Seventh Circuit correctly applied *Unitherm*.

The Seventh Circuit properly applied *Unitherm*, holding that an evidentiary error is properly preserved for appeal under Federal Rule of Evidence 103(a) by a definitive ruling on a motion *in limine*, even if the appealing party makes no Rule 50(b) motion after the jury's verdict. *Id.* at A-24, -26. Federal Rule of Evidence 103(a) was revised in 2000 to resolve a conflict among the circuits by adding this sentence: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *Amendments to FED. R. EVID.*, 192 F.R.D. 398, 403 (2000) (Advisory Comm. Report).

The Seventh Circuit applied *Unitherm* only to appellate claims that a verdict is supported by insufficient evidence, holding that such claims are preserved only if they have first been raised by a Rule 50(b) motion. Pet. App. A-22. The Seventh Circuit acknowledged that some language in *Unitherm* could be read more broadly, but reasoned that if *Unitherm* intended to erode the provision of Rule of Evidence 103 stating that an evidentiary objection properly preserved before trial need not be renewed at trial, "we presume the Court would have done so explicitly, addressing Rule 103 as well as the substantial body of cases in which courts of appeals have awarded new trials purely on the basis of evidentiary errors." *Id.* at A-26, -28 (citing cases and treatises).

Even so, the Seventh Circuit held that *Unitherm* required revision of the relief it had provided Zimmer. In the Seventh Circuit's initial, pre-*Unitherm* opinion, it remanded with instructions to direct a verdict in Zimmer's favor. Pet. App. A-17. That relief required the Seventh Circuit to weigh the evidence, at least so that the appellate court could determine that without the evidence excluded under *Daubert*, Fuesting could not prove an element of his case. *Id.* at A-22, -23.

The Seventh Circuit determined that it could not mandate a directed verdict in Zimmer's favor because to do so would require the sort of evidentiary reweighing made impermissible by *Unitherm*. *Id.* But because Zimmer properly preserved the evidentiary error under Rule of Evidence 103, the court of appeals was justified in remanding for a new trial. *Id.* at A-24, -26.

The Seventh Circuit properly applied *Unitherm* and rejected Fuesting's overbroad reading that every error of every kind is waived on appeal unless it is preserved through a Rule 50 motion. Fuesting broadly reads *Unitherm* to reject not only settled law on how to preserve evidentiary objections under Rule of Evidence 103, but also settled law on preserving such claims as instructional error, jury error, and other legal errors. Pet. for Cert. at 8; *but see Elmore v. U.S.*, 843 F.2d 1128, 1131 n.7, 1133 (8th Cir. 1988) (instructional error preserved by complying with FED. R. CIV. P. 51); *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, 939 (4th Cir. 1991) (claim of error in jury composition must be raised before jury is sworn); *Chemetall GMHB v. ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003) (errors of law, such as contract construction, are reviewable without post-trial motion). The Seventh Circuit wrote that it would not construe *Unitherm* so broadly "without an explicit declaration from the Supreme Court." Pet. App. A-28. And the commentators are in full agreement with the Seventh Circuit's construction of *Unitherm*, explaining that *Unitherm* applies to

sufficiency of the evidence errors. *See* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROCEDURE SUPP. SERVICE, § 2537 (Jan. 2007); 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 50.91[1] (3d ed. 2006); *Id.* at 19 § 205.5[3] (3d ed. 2006).

Certiorari is not appropriate because the Seventh Circuit's holding is consistent with *Unitherm*.

II. There is no circuit conflict.

Other circuits have applied *Unitherm* consistently with the Seventh Circuit. Just as *Fuesting* declined to weigh sufficiency of evidence absent a Rule 50(b) motion, yet granted a new trial for a properly preserved evidentiary error, the First and Ninth Circuits have done so as well. *Vázquez-Valentín v. Santiago-Díaz*, 459 F.3d 144 (1st Cir. 2006), *petition for cert. filed*, 75 USLW 3295 (U.S. Nov. 17, 2006) (No. 06-702); *Metcalf v. Bochco*, No. 04-56097, 2006 WL 2472193 (9th Cir. Aug. 28, 2006) (unreported[1]).

Similar to *Fuesting*, the *Vázquez-Valentín* appellants requested a new trial premised on their argument that the district court improperly excluded their evidence. *Vázquez-Valentín*, 459 F.3d at 147, 151. The First Circuit found that the district court improperly excluded the evidence to which the appellants timely objected during the proceedings. *Id.* at 151-52. Under Rule of Evidence 103, a party makes a "timely objection" to a ruling excluding evidence by making an offer of proof either in question-and-answer form to the intended witness, or by statement of counsel as to what he or she expects the testimony to show. *See* 1 MCCORMICK ON EVID. § 51 (6th ed. 2006); *Burrus v. Young*, 808 F.2d 578, 589 (7th Cir. 1986) (Coffey, J., concurring). *Vázquez-Valentín*

---

[1] Fuesting discussed this unreported decision in the petition for certiorari. *See* 9TH CIR. R. 36-3 (restricting citation of unpublished Ninth Circuit opinions).

held that appellants were entitled to a new trial even though they had not moved for a directed verdict under Rule 50(a) or a new trial under Rule 50(b) because they appropriately proffered the evidence at issue during trial. *See Vázquez-Valentín,* 459 F.3d at 149-52.

In *Metcalf*, the Ninth Circuit also interpreted *Unitherm* consistent with *Fuesting* and *Vázquez-Valentín*, observing in a footnote that *Unitherm* did not bar the appellants' request for a new trial based on alleged evidentiary errors because *Unitherm* addressed an insufficiency of evidence claim and therefore was "inapposite." *Metcalf,* 2006 WL 2472193 at *1, n.1 (stating that *Unitherm* "deals with the specific situation of a party's failure to renew, post-verdict, a Rule 50 motion challenging the sufficiency of the evidence in a civil jury trial. The Supreme Court held that without satisfying this crucial step, the party cannot on appeal seek the remedy of a new trial on the basis that the evidence below was insufficient to support the jury verdict.") (citation omitted). The panel ultimately concluded that the Metcalfs were not entitled to a new trial because each of their evidentiary error claims failed as a matter of law. *See id.* at *1-4.

Fuesting incorrectly cites *Hi Limited Partnership v. Winghouse of Florida, Inc.*, 451 F.3d 1300 (11th Cir. 2006), as his only example of a Court of Appeals case that conflicts with other circuits' application of *Unitherm. Hi Limited*, Fuesting argues, properly applies his broad interpretation of *Unitherm* to an appeal that is not premised on a sufficiency of evidence argument.

Hi Limited is correctly decided, but it does not conflict with *Fuesting*, *Metcalf* or *Vázquez-Valentín.* The issue in *Hi Limited* was whether a settlement agreement violated the Statute of Frauds, and *Hi Limited*: (1) lost its motion for directed verdict; (2) did not object to the district court's jury instruction; (3) lost the jury verdict; and (4) made no Rule 50(b) motion or motion for new trial after the verdict. *See Hi*

Limited, 451 F.3d at 1301. While the Eleventh Circuit's six-paragraph opinion stated that Hi Limited's claim was barred by *Unitherm*, the immediate bar to the claim on appeal was Hi Limited's failure to preserve any objection to the jury instruction, which was the basis for the jury's $1.2 million verdict against Hi Limited.

Even if Hi Limited had filed a Rule 50(b) motion, it still would not have preserved the instructional error for appeal because it made no timely objection. Federal Rule of Civil Procedure 51 governs the process by which parties preserve their objections to jury instructions. "A party who fails to raise an objection to a ... jury instruction prior to jury deliberations waives its right to raise the issue on appeal." *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999); *see also, e.g., Alexander v. Riga*, 208 F.3d 419, 426 (3d Cir. 2000) ("Generally, a party who does not clearly and specifically object to a [jury instruction] he believes to be erroneous waives the issue on appeal."), *cert. denied*, 531 U.S. 1069 (2001).

In addition to the cases discussed above, nearly a dozen reported and unreported court of appeals opinions apply *Unitherm* consistent with *Zimmer v. Fuesting*. *See, e.g., Santos v. Posadas De Puerto Rico Assocs., Inc.*, 452 F.3d 59, 66 (1st Cir. 2006) (applying *Unitherm* to reject appellant's sufficiency of evidence claim because it did not make a Rule 50(b) motion in the lower court); *Barnes v. Rivas*, No. 05-41436, 2006 WL 3334583, *1 (5th Cir. Nov. 17, 2006) (applying *Unitherm* to reject appellant's sufficiency of evidence claim because he did not move under Rule 50(a) or (b); rejecting appellant's appeal based on a peremptory strike error because appellant did not challenge the error in the lower court) (unreported[2]); *Hamilton v. Leavy*, No. 05-2059, 2006 WL 3203920, *1 (3d Cir. Nov. 7, 2006) (applying

---

[2] Cited pursuant to permissive authority of Fifth Circuit Rule 47.5.4.

Unitherm to reject appellant's sufficiency of evidence claim because he did not make a Rule 50(a) motion in the lower court; rejecting appellant's appeal based on improper jury instruction because appellant did not object to the instruction in the lower court) (unreported[3]); *Calton v. City of Garland*, No. 05-10364, 170 Fed.Appx. 338, *1 (5th Cir. March 8, 2006) (applying *Unitherm* to reject appellant's sufficiency of evidence claim because he did not make Rule 50(a) or (b) motions), *cert. denied*, 127 S. Ct. 133 (2006) (unreported).

Also, unreported Eleventh Circuit opinions cast doubt on Fuesting's claim of circuit conflict because they are inconsistent with his reading of *Hi Limited*. *See First United Pentecostal Church v. Guideone Specialty Mut. Ins. Co.*, No. 05-12398, 189 Fed. Appx. 852, *3 (11th Cir. June 28, 2006) (applying *Unitherm* to reject appellant's sufficiency of evidence claim because it did not make Rule 50(a) or (b) motions) (unreported[4]); *McDonald v. Alpen House Ltd., Corp.*, No. 05-15904, 183 Fed.Appx. 867, 868 (11th Cir. June 7, 2006) (applying *Unitherm* to reject appellant's sufficiency of evidence claim because she did not make Rule 50(a) or (b) motions) (unreported); *Frazier v. Thomas*, No. 05-15489, 176 Fed. Appx. 996, 996-97 (11th Cir. April 21, 2006) (applying *Unitherm* to reject appellant's sufficiency of evidence claim because he did not make Rule 50(a) or (b) motions) (unreported). Other circuits, which do not permit citation of their unreported decisions in this context, have issued unpublished opinions consistent with *Zimmer v. Fuesting* that are available in electronic databases. Zimmer has found no reported or unreported opinion inconsistent with the Seventh Circuit's application in this case.

Assuming *arguendo* that the outcome in the Eleventh Circuit's *Hi Limited* opinion conflicts with *Fuesting*, *Vázquez-*

---

[3] Cited pursuant to permissive authority of Third Circuit Rule 28.3.

[4] Cited pursuant to permissive authority of Eleventh Circuit Rule 36-2.

Valentín, *Metcalf*, and the other decisions discussed above (which it does not), this Court should not use its resources to address one single outlying opinion (especially when the sole discordant decision is not the one before the Court). Moreover, this Court decided *Unitherm* less than one year ago. To the extent a conflict exists, it is a fresh conflict that will benefit from further "percolation" and review in the lower courts.

The cases on which Fuesting relies to support his assertion that the courts of appeal are "sharply" divided on this issue (i.e., *Hi Limited*, *Metcalf* and *Vázquez-Valentín*) are consistent with one another and consistent with *Unitherm*. Other courts of appeals have reached the same, correct conclusions when presented with the same legal issues. No conflict justifies certiorari in this matter.

III. The Seventh Circuit properly applied error preservation principles.

Unitherm properly holds that an appellant forfeits its appeal by failing to present a claim of insufficient evidence to the district court through a Rule 50(b) motion after the jury's verdict. This holding properly defers to the district court's expertise and first-hand observation and correctly applies concepts of appellate court deference. But Fuesting's broad reading—that no error of any kind can be raised on appeal unless first raised in a Rule 50(b) motion—improperly applies principles governing error preservation, creates traps for the unwary, and contradicts many existing legal rules. *See, e.g., U.S. v. Gajo,* 290 F.3d 922, 927 (7th Cir. 2002) (evidentiary error preserved by definitive ruling on pre-trial motions *in limine* under FED. R. EVID. 103), *cert. denied*, 537 U.S. 938 (2002); *Elmore v. U.S.*, 843 F.2d 1128, 1131 n.7, 1133 (8th Cir. 1988) (instructional error preserved by complying with FED. R. CIV. P. 51).

Various types of trial errors are preserved differently. It is inconsistent with both current law and principles of judicial economy to require (as Fuesting argues) that every type of error be filtered through Rule 50(b) in order to be preserved. *Unitherm* properly mandates that a claim of insufficient evidence is not preserved for appeal unless it is first presented to the district court under Rule 50(b) because of the district court's unique perspective on the evidence, having observed the trial, and the benefit to the appellate court rendered by the district court's perspective.

But unlike sufficiency of evidence appeals, where the district court's view of the evidence is uniquely helpful to the appellate court, many other types of appeals are not assisted by Rule 50(b) review. For example, if an instructional error is preserved by a timely objection and offer of an alternative, no benefit accrues on appeal from presenting the issue again to the district judge after verdict. Similarly, if an error in jury composition is preserved by proper objection during voir dire, presenting the issue to the district judge again after the verdict does not assist the appeal. And if an evidentiary error is properly preserved under Rule of Evidence 103, there also is no advantage in presenting it again to the trial judge before appeal. Moreover, as the Seventh Circuit pointed out, Fuesting's construction of *Unitherm* goes so far that it would preclude an appellate court from even the minimal weighing sometimes necessary to gauge whether error is harmless. Pet. App. A-24, -25.

Thus, *Unitherm* is properly limited—as it has been by all the courts of appeals that have applied it—to appeals challenging sufficiency of evidence.

IV. There are alternative grounds to grant a new trial.

If this Court granted certiorari and ruled in Fuesting's favor, this case would likely still be retried based on other errors the Seventh Circuit has not yet addressed. Zimmer

BEST AVAILABLE COPY

raised four errors on appeal, and the Seventh Circuit reversed and remanded for a new trial without reaching three of those errors. Thus, even if this Court ruled for Fuesting on the merits, the Seventh Circuit would have to address Zimmer's three additional, properly preserved arguments that the district court improperly instructed the jury and improperly excluded evidence.

Moreover, because the relief granted by the Seventh Circuit was new trial, the issue Fuesting raises in his petition would become moot if, on remand, Zimmer prevailed in the district court.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

JON LARAMORE
Counsel of Record
STEVEN L. JACKSON
J. STEPHEN BENNETT
KATHY L. OSBORN
BAKER & DANIELS LLP
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204-1782
(317) 237-0300

Counsel for Respondent